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10                   **UNITED STATES DISTRICT COURT**  
11                   **SOUTHERN DISTRICT OF CALIFORNIA**

12  
13 AARON BLANK,

Case No. 12-cv-2611-W(BGS)

14                   Plaintiff,

15                   **ORDER GRANTING MOTION**  
16                   **FOR RELIEF FROM DEFAULT**  
17                   **[DOC. 26]**

v.

18 HYDRO-THERMAL  
19 CORPORATION, *et al.*,

Defendants.

20                   On September 21, 2012, Plaintiff commenced this action against Defendants in  
21 the San Diego Superior Court. On October 26, 2012, Defendant Hydro-Thermal  
22 Corporation (“HTC”) removed the action to this Court. The Court dismissed the  
23 action for failure to prosecute on October 8, 2013.

24                   Plaintiff now moves for relief from that dismissal. Defendant opposes. For the  
25 following reasons, the Court **GRANTS** Plaintiff’s motion. (Doc. 26.)

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1   **I. BACKGROUND**

2       Aaron Blank brought this action for breach of contract, failure to pay wages in  
 3 violation of California Labor Code §201, waiting time penalty for non-payment of wages  
 4 under California Labor Code § 203, wrongful termination in violation of public policy,  
 5 declaratory relief, and violation of California Business and Professions Code §17200.  
 6 After HTC removed the action to this Court, both Mr. Blank and his attorney, Mr.  
 7 Mark Teuton, failed to appear at a court-ordered Early Neutral Evaluation conference  
 8 on July 1, 2013. United States Magistrate Judge Bernard G. Skomal issued an order to  
 9 show cause why sanctions should not be imposed (“OSC”). Plaintiff did not file a  
 10 responsive brief to the OSC, so HTC moved to dismiss for lack of prosecution.

11      On September 4, 2013, Mr. Blank filed a motion to substitute attorney,  
 12 contending that “Mr. Teuton has abandoned Plaintiff and this case and Plaintiff has  
 13 been unable to locate Mr. Teuton or communicate with him” since October of 2012.  
 14 (*Substitution Mt.* [Doc. 15], 15.) On September 12, 2013, the Court Granted Mr.  
 15 Blank’s motion to substitute Mr. Alan L. Williams as his new attorney. (*See Substitution*  
 16 *Order* [Doc. 16].) Approximately a month later, the Court granted HTC’s motion to  
 17 dismiss for failure to prosecute, dismissing the case without prejudice. (*See Dismissal*  
 18 *Order* [Doc. 22].) In so doing, the Court noted that “[d]espite the substitution, to date,  
 19 Plaintiff has not filed an opposition to Defendant’s motion to dismiss, nor has Plaintiff  
 20 filed a request for an extension of time to file an opposition. Instead, Plaintiff has left  
 21 the motion unopposed.” (*Id.*, 2:10–12.)

22      On November 6, 2013, Mr. Blank filed the instant motion to set aside default.  
 23 HTC opposes.

24

25   **II. LEGAL STANDARD**

26      Once judgment has been entered, reconsideration may be sought by filing a  
 27 motion under either Federal Rule of Civil Procedure 59(e) (motion to alter or amend  
 28

1 a judgment) or Federal Rule of Civil Procedure 60(b) (motion for relief from judgment).  
 2 See Hinton v. Pac. Enter., 5 F.3d 391, 395 (9th Cir. 1993).

3 Rule 60(b) provides for extraordinary relief and may be invoked only upon a  
 4 showing of exceptional circumstances. Engleson v. Burlington N.R. Co., 972 F.2d  
 5 1038, 1044 (9th Cir.1994) (citing Ben Sager Chem. Int'l v. E. Targosz & Co., 560 F.2d  
 6 805, 809 (7th Cir. 1977)). Under Rule 60(b), the court may grant reconsideration  
 7 based on: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered  
 8 evidence which by due diligence could not have been discovered before the court's  
 9 decision; (3) fraud by the adverse party; (4) the judgment is void; (5) the judgment has  
 10 been satisfied; or (6) any other reason justifying relief. Fed. R. Civ. P. 60(b).

11 Rule 60(b)(6) is a "catchall provision" that applies only when the reason for  
 12 granting relief is not covered by any of the other reasons set forth in Rule 60. United  
 13 States v. Washington, 394 F.3d 1152, 1157 (9th Cir. 2005), *overruled on other grounds*  
 14 by United States v. Washington, 593 F.3d 790 (9th Cir. 2010). "It has been used  
 15 sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only  
 16 where extraordinary circumstances prevented a party from taking timely action to  
 17 prevent or correct an erroneous judgment." Id. (internal quotation marks omitted).  
 18 Thus, to reopen a case under Rule 60(b)(6), a party must establish "both injury and  
 19 circumstances beyond his control that prevented him from proceeding . . . in a proper  
 20 fashion." Id. (internal quotation marks omitted)

21 "[W]here the client has demonstrated gross negligence on the part of his counsel,  
 22 a default judgment against the client may be set aside pursuant to Rule 60(b)(6)." Cnty.  
Dental Servs. v. Tani, 282 F.3d 1164, 1169 (9th Cir. 2002). "[T]he rule is  
 23 remedial in nature and thus must be liberally applied." Id. (citing Falk v. Allen, 739  
 24 F.2d 461, 463 (9th Cir.1984) (per curiam)). "[J]udgment by default is an extreme  
 25 measure and a case should, 'whenever possible, be decided on the merits.' " Id. at 1170  
 26 (quoting Falk, 739 F.2d at 463). Counsel who "abandons his duties as an attorney"  
 27 despite telling a client that a case is "proceeding properly" commits gross negligence.  
 28

1     See *id.* at 1171. “[C]onduct on the part of a client's alleged representative that results  
 2     in the client's receiving practically no representation at all clearly constitutes gross  
 3     negligence, and vitiating the agency relationship that underlies our general policy of  
 4     attributing to the client the acts of his attorney.” *Id.*

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6     **III.    DISCUSSION**

7       In *Tani*, an attorney violated a court order to attend a settlement conference  
 8     call, failed to provide the opposing party with a copy of his client's answer, and, though  
 9     he appeared at a hearing, failed to oppose in writing motions to strike his client's answer  
 10    and for default judgment against his client. 282 F.3d at 1167. The default order in that  
 11    case was delivered to the client's office because the attorney used that location as his  
 12    address of record. *Id.* The Ninth Circuit found that such failures went beyond attorney  
 13    error or neglect, and held that the District Court abused its discretion by finding  
 14    culpable conduct on the part of the client rather than the attorney. See *id.* at 1172.

15       Mr. Blank demonstrates inexcusable conduct on the part of Mr. Teuton that  
 16     constitutes gross negligence, the result of which was Mr. Blank receiving virtually no  
 17     representation in this matter. According to Mr. Blank, Mr. Teuton stated at the outset  
 18     that “the case would take a long time to move towards trial” and that “there would . . .  
 19     . be long periods where Mr. Teuton would not be in communication with [him].” (Pl.'s  
 20    Mot. [Doc. 26-1], 3:12-17.) Unlike the attorney in *Tani*, who at least appeared at a  
 21    hearing on behalf of his client, Mr. Teuton “has for all intents and purposes  
 22    disappeared,” having failed to contact Mr. Blank since HTC removed the action to this  
 23    Court in October of 2012. As did the attorney in *Tani*, Mr. Teuton failed to appear at  
 24    a court-ordered conference. And also like the attorney in *Tani*, who failed to file  
 25    written oppositions to pending motions, Mr. Teuton failed to file a responsive  
 26    declaration to the OSC and failed to oppose the resulting motion to dismiss the case.  
 27    Finally, while the *Tani* attorney's use of his client's office as an address of record may  
 28    have at least resulted in notifying the client of proceedings in the case, in this matter

1 attempts by both parties to contact Mr. Teuton have failed. The end result of Mr.  
 2 Teuton's conduct was that Mr. Blank received practically no representation whatsoever  
 3 in this matter after the initial complaint was filed in Superior Court.

4 HTC contends that "Plaintiff's showing comes nowhere close to satisfying the  
 5 rigorous standard applying to motions under Rule 60(b) (6)." It supports this conclusion  
 6 with two lines of reasoning.

7 First, HTC points out Mr. Blank's failure to oppose HTC's motion to dismiss for  
 8 nearly one month after he substituted Mr. Williams as his new attorney. As the Ninth  
 9 Circuit reasoned in Tani, "[J]udgment by default is an extreme measure and a case  
 10 should, 'whenever possible, be decided on the merits.'" 282 F.3d at 1169. Both the due  
 11 date and hearing date for HTC's motion to dismiss had passed by the time Mr. Williams  
 12 was substituted as Mr. Blank's attorney. The Court recognizes that nothing prevented  
 13 Mr. Blank's new attorney from seeking leave to file a late opposition to HTC's motion,  
 14 particularly given the grounds for the motion to substitute counsel. The Court is also  
 15 somewhat concerned that by doing nothing after substituting into the case, Mr. Blank  
 16 appears to have replaced an attorney who did nothing to represent his client for nearly  
 17 a year with an attorney who did nothing for nearly a month to oppose a pending motion  
 18 to dismiss. Nevertheless, the Court finds under Tani, the circumstances do not warrant  
 19 denial of the motion for relief.

20 Second, HTC argues, "given that the Court granted dismissal without prejudice,  
 21 Plaintiff cannot show an actual injury sufficient to justify setting aside the Courts' [sic]  
 22 judgment." (Def.'s Opp'n [Doc. 28], 7:19-23.) It provides no authority standing for the  
 23 proposition that dismissal of a case without prejudice is not sufficient injury to justify  
 24 granting a Rule 60 motion. HTC concedes in the very same paragraph that Mr. Blank  
 25 may suffer "a modest burden" in re-filing his claims were the instant motion to be  
 26 denied. (*Id.*, 8:1-3.) Regardless of whether such burden is "Plaintiff's own doing," as  
 27 HTC asserts, HTC presents no basis for a finding that such an injury is insufficient to  
 28 justify Rule 60(b) relief.

1     IV. **CONCLUSION & ORDER**

2       In light of the foregoing, the Court **GRANTS** Plaintiff's motion for relief from  
3 default [Doc. 26]. The order dismissing this case for lack of prosecution [Doc. 22] is  
4 **VACATED**. Plaintiff is cautioned, however, that any further delay prosecuting this  
5 case will result in the dismissal of the case.

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7       **IT IS SO ORDERED.**

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9       **DATED:** March 12, 2014

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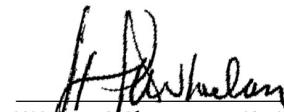
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Hon. Thomas J. Whelan  
United States District Judge